



Department of Transportation Secretary's Office

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March 6, 2017

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
FCC Headquarters
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Response to Public Notice – Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies;
Mobilitie, LLC, Petition for Declaratory Ruling,
WT Docket No. 16-421

Dear Secretary Dortch:

Please find enclosed comments from the South Dakota Department of Transportation in regards to the above referenced subject. We would like to thank the FCC for providing the opportunity to comment on this very important topic and one the FCC and FHWA should carefully consider as the nation prepares to move forward with technological advances in cell phone usage and connected and autonomous vehicles.

Again, thank you for the opportunity.

Sincerely,

Darin Bergquist, Secretary
South Dakota Department of Transportation

Response to Public Notice – Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies
Mobilitie, LLC, Petition for Declaratory Ruling WT Docket No. 16-421

The South Dakota Department of Transportation (“SDDOT”) is submitting comments concerning Mobilitie’s Petition for Declaratory Ruling. Although the Public Notice seeks comment on local governments’ siting authority, SDDOT is submitting comments from perspective of a state transportation agency responsible for managing public rights-of-way, which are a focus of Mobilitie’s petition.

SDDOT requests that the FCC deny Mobilitie’s petition for the reasons stated below, grouped according to the *Potential Issues to Address in Declaratory Ruling* cited in the Public Notice. In addition, SDDOT requests that the FCC and FHWA coordinate to facilitate immediate fact-finding and disclosure to state DOTs regarding the potential scope, magnitude, and effect of the deployment of this technology in state and local highway right-of-way and the impact on connected and autonomous vehicles.

Practices that “Prohibit or Have the Effect of Prohibiting” Provision of Service

SDDOT opposes any action that would diminish its authority to properly manage and regulate the use of public highway right-of-way.

The primary function of state highways is to provide for safe and efficient movement of people and goods. State highways generally move higher traffic volumes over longer distances, carry more freight, and involve higher travel speeds than highways under local jurisdiction. Although SDDOT accommodates utilities, its primary responsibility is to maximize the public use and benefit of the right-of-way for transportation purposes and ensure that any utilities affecting the state right-of-way are installed, maintained, and accessed in compliance with state and federal law and regulation.¹ The permitted use and occupancy of right-of-way for non-highway purposes is subordinate to the primary and highest interest for transportation and safety of the traveling public.² On Interstate and federal-aid highways, the Federal Highway Administration’s (“FHWA”) rules concerning utility accommodation apply.

¹ “Pursuant to the provisions of 23 CFR 1.23, it is in the public interest for utility facilities to be accommodated within the right-of-way of Federal-aid or direct Federal highway project when such use and occupancy of highway right-of-way do not adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality, and do not conflict with the provisions of Federal, State, or local laws or regulations.” 23CFR §645.205(a).

² “The manner in which utilities cross or otherwise occupy the right-of-way of a direct Federal or Federal-aid highway project can materially affect the highway, its safe operation, aesthetic quality, and maintenance. Therefore, it is necessary that such occupancy, where authorized, be regulated by transportation departments in a manner which preserves the operational safety and the functional operational safety and the functional and aesthetic quality of the highway facility. This subpart shall be construed to alter the basic legal authority of utilities to install their facilities on public highways pursuant to law or franchise and reasonable regulation by transportation departments with respect to location and manner of installation.” 23 CFR §645.205(c).

SDDOT has a permitting process for utilities to occupy the right-of-way. Most telecommunication facilities that SDDOT allows in the highway-right-of-way are underground communication fiber lines, which do not interfere with highway use. SDDOT does not allow utility facilities to be placed on existing highway structures such as luminaire poles, traffic signal poles, or sign bridges, due to safety and operational concerns. Mobility is unique in its request to install telecommunication pole towers of up to 120 feet in height. These pole towers would similarly affect highway safety and aesthetics in ways that directly concern SDDOT and local governments. Additionally, highway construction and maintenance projects could often impact pole tower sites located in the right-of-way and potentially disrupt telecommunications facilities and service to the public at increased cost.

To preserve safe and efficient traffic operations, SDDOT does not allow above-ground utilities to be placed within the clear zone of the highway facility, except in extraordinary circumstances.³ In those rare situations, protective measures such as breakaway features, impact attenuating devices, or barriers are required to reduce safety hazards and address concerns resulting from errant vehicles. While these measures reduce crash severity, they do not eliminate the safety risks during utility installation, maintenance, and servicing. Even with mitigation devices, above-ground utilities such as poles pose safety risks.

For Interstate highways, no utility installation that adversely affects public safety is allowed.⁴ Furthermore, SDDOT may adopt a more restrictive policy concerning a longitudinal utility installation along freeway rights-of-way.⁵ South Dakota Administrative Rule 70:04:05:01:01 prohibits longitudinal utility installations within the Interstate right-of-way, except that longitudinal installations of fiber-optic telecommunications cable are allowed as near the edge of right-of-way as practical. Because the safety and efficiency of controlled access Interstate highways depend upon limiting traffic access to defined entrance and exit points, SDDOT is particularly concerned about traffic entering and exiting Interstate highway rights-of-way at uncontrolled locations to install, maintain, and operate telecommunications facilities.

SDDOT obtains highway right-of-way through Tribal lands and Federally-owned lands, such as those managed by the U. S. Department of Interior, strictly for highway use only. Non-highway uses such as utility accommodation are not under the State's jurisdiction. A utility permit granted by the SDDOT does not relieve a utility of the obligation to obtain any other permit, license, or other approval required by other entities holding a property interest in the right-of-way, such as Tribal governments, the South Dakota Office of School and Public Lands, the U.S. Forest Service, the Bureau of Indian Affairs, and

³ 23 CFR §645.207 & 23 CFR §645.209(a)&(b).

⁴ 23 CFR §645.209(c)(2)(i).

⁵ 23 CFR §645.209(a)(3).

many others. Local governments and other federal agencies may require coordination and approvals.⁶

Reasonable Period of Time for Review of Siting Applications

SDDOT opposes rigid time limits for review of siting applications at this time.

SDDOT agrees that timely responses to siting applications should be provided, but feels that short turnaround cannot be guaranteed. The burgeoning requests for deployment of small cell infrastructure have caught state and local agencies without adequate time to develop well-founded policies and criteria for siting approvals. The nature and extent of the deployment and the potential impact on highway infrastructure are not yet well understood. Limits on review periods should not be set until agencies have been given a reasonable opportunity to develop policies and procedures consistent with their federally required utility accommodation policies and, if necessary, to modify their policies in response to the scope, magnitude, and needs of the new technology.

Appropriate time periods for individual or group site applications may vary, depending on specific circumstances. In one respect, group applications are preferable because sites in the group may share common attributes. In contrast to a piecemeal series of individual applications, a well-fashioned group application may provide greater insight into the ultimate deployment configuration. Due to the larger number of sites that must be reviewed, a group application would typically require more time than an individual application, but less than the total time required to review an equivalent series of individual applications.

Application Processing Fees and Charges for Use of Rights-of-Way

SDDOT opposes restricting fees to costs related only to reviewing and issuing permits and managing rights-of-way.

Section 253(c) provides that “nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunication providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁷ SDDOT believes that the wording “compensation...for use” rather than “compensation for...associated costs” (for example) is significant. In the case of state highways, the right-of-way represents a public investment of many millions of dollars made over decades, and it is unreasonable to argue that its use has no value to the public or to utilities or that the value of right-of-way remains

⁶ 23 USC §135(f)(2) and 23 CFR§450.208, §450.214, §450.216, and §450.316.

⁷ 47 U. S. C. §253(c).

constant over time. Requiring compensation that reflects prevailing market value for use is inherently “fair and reasonable”.

Furthermore, ultimate costs to state and local agencies extend beyond immediate administrative and maintenance costs. The presence of collocated telecommunications facilities may limit options for transportation facility improvement, expansion, and rehabilitation and increase the cost of future public highway improvements and right-of-way acquisition.

Limiting compensation to recovery of immediate administrative and maintenance costs could also discourage more innovative arrangements that would provide greater overall public benefit. For example, in South Dakota, permission for fiber communication lines to occupy highway right-of-way was granted with the provision that service be extended to public schools and local government agencies. The arrangement was mutually beneficial to the telecommunications industry and the public interest, but would not have been allowed under the restrictions proposed by Mobilitie. Such restrictions could be particularly harmful in the current era of connected and autonomous vehicle deployment, where public-private partnerships to establish or share roadside communications infrastructure for transportation purposes could be tremendously beneficial to transportation safety and efficiency.

SDDOT disagrees with the contention that the phrase “competitively neutral and nondiscriminatory” means that charges imposed on one provider for access to rights-of-way cannot exceed charges imposed on other providers for similar access.

Even if compensation were to be restricted to recovery of administrative and right-of-way maintenance costs, those costs would not remain constant over time or uniform among locations. If, as SDDOT advocates, compensation should also include a fair and reasonable charge for use, rates would vary. Furthermore, physical constraints may make siting a later provider more difficult and expensive than siting the initial provider. Requiring public agencies to fix compensation charges to the lowest rate ever given to any provider would be comparable to requiring telecommunication service providers to maintain fixed, equal rates for all customers, forever.

SDDOT accepts the concept of open reporting of fees.

Section 253(c) already requires public disclosure of compensation terms. Disclosure is consistent with state policy.